Cases—Continued

Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275 20
Permian Basin Area Rate Cases, 390 U.S. 747 16
Portland General Electric Co. v. *Federal Power Commission*, 328 F. 2d 165 20
Scenic Hudson Preservation Conference v. *Federal Power Commission*, 354 F. 2d 608, certiorari denied *sub nom. Consolidated Edison Co.* v. *Scenic Hudson Preservation Conference*, 384 U.S. 941 ..... 8, 14
Udall v. *Federal Power Commission*, 387 U.S. 428 16
Zabel v. *Tabb*, 430 F. 2d 199, certiorari denied, 401 U.S. 910 14

Statutes:

Federal Water Power Act (Act of June 10, 1920, 41 Stat. 1063, 16 U.S.C. 791-823, as subsequently amended (46 Stat. 797) including amendments and additions and change of name by Title II of the Public Utility Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 838, 16 U.S.C. 791a-825r) 14, 20
Section 10(a), 16 U.S.C. 803(a) 3, 5, 15
Section 10(e), 16 U.S.C. 803(e) 20
Section 27, 16 U.S.C. 821 ..... 3, 4, 19, 20
Section 313(b), 16 U.S.C. 825l(b) 2, 3, 4, 16, 17
National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* 3, 14
Section 101 3
Section 102 3
Section 102(2)(C) 18
Reclamation Project Act of 1939, Section 9, 43 U.S.C. 383 (1964 ed.) 20

Miscellaneous:

	Page
Federal Power Commission Regulations under the Federal Power Act, 18 C.F.R. 4.41	17
Hudson River Fisheries Investigations, 1965–1968	13
Report on the Land and Water Resources of the New England Region, Sen. Doc. No. 14, 85th Cong., 1st Sess. (1957)	13

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1219

SCENIC HUDSON PRESERVATION CONFERENCE, ET AL.,
PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

No. 71-1220

THE CITY OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

No. 71-1221

THE SIERRA CLUB AND ITS ATLANTIC CHAPTER,
PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (City App. 1a-62a)[1] is reported at 453 F.2d 463, and its orders denying rehearing (City App. 202a–204a) are reported at 453 F.2d 494. The opinion of the Federal Power Commission (City App. 63a–201a) is reported at 44 FPC 350 and its order denying petitions for rehearing is reported at 44 FPC 1189. The decisions of the Hearing Examiner are reported at 44 FPC 436 and 44 FPC 522.

JURISDICTION

The judgment of the court of appeals (Scenic Hudson App. A92–A93) was entered on October 22, 1971. Petitions for rehearing were denied on November 26, 1971 (City App. 202a–204a). On February 15, 1972, Mr. Justice Marshall extended the time for filing petitions for writs of certiorari to March 24, 1972, and on that date the petitions were filed. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission's order reaffirming the licensing of the construction of a pumped storage project on the Hudson River is rationally based and supported by substantial evidence on the record.

---

[1] "City App." references are to the appendix to the petition filed by The City of New York, No. 71-1229. "Scenic Hudson App." references are to the appendix to the petition filed by Scenic Hudson Preservation Conference, *et al.*, No. 71-1219.

2. Whether the Federal Power Commission complied with the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*, by (1) making exhaustive findings on environmental matters based on a record closed prior to the effective date of the Act and (2) including an environmental impact statement in its decision issued after the Act had become effective, and properly discharged its planning responsibilities under Section 10(a) of the Federal Power Act, 16 U.S.C. 803(a).

3. Whether Section 27 of the Federal Power Act, 16 U.S.C. 821, precludes the licensing of the present project, even though there is substantial evidence that the project will not interfere with the Catskill Aqueduct supplying water to New York City and there is no appropriation or use of the City's water.

STATUTES INVOLVED

Sections 101 and 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332 and 4333, are set forth at City App. 205a–209a. Sections 10, 27 and 313 (b) of the Federal Power Act, 16 U.S.C. 803, 821 and 825l(b), provide in pertinent part:

Section 10:

> All licenses issued under this subchapter shall be on the following conditions:
>
> (a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improve-

ment and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * *

Section 27:

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Section 313(b):

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia * * *. Upon the filing of [a petition for review] such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. * * * The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *.

In Opinion No. 584 (City App. 63a–201a), the Federal Power Commission granted a license to Consolidated Edison Company of New York, Inc., (Con Ed) for the construction, operation and maintenance of a pumped storage project on the Hudson River. On petitions for review, the court below affirmed, holding that the decision was supported by substantial evidence on the record and that the Commission had complied with its obligations under Section 10(a) of the Federal Power Act, 16 U.S.C. 803(a), and the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

A. DESCRIPTION OF THE PROJECT

The pumped storage development licensed by the Commission, known as the Cornwall project, is to be located on the Hudson River approximately 40 miles north of New York City and will consist of an upper storage reservoir, a completely underground powerhouse[1] and primary transmission lines (City App. 63a–64a, 192a–193a). The purpose of the project is to help meet the rapidly increasing energy demands of the New York City area by using off-peak energy generated by non-project steam electric, nuclear or other facilities to pump water from the Hudson River

---

[1] As originally proposed, the powerhouse was to be only 80 percent underground. Scenic Hudson witness Carmer testified that if an underground powerhouse were built, he would not oppose the project (R. 1013). "R" references are to the certified pagination listed in the Certificate of Record in Lieu of Record filed in the court below.

to the upper storage reservoir so that the water can be released during peak hours of demand to generate electricity (City App. 75a–76a).

The reservoir, with a surface area of 240 acres when filled to its maximum elevation of 1160 feet above mean sea level, is to be located behind Storm King Mountain and will not be visible from the river; it will be formed by five earth-and-rock filled dikes located in saddles between ridges (City App. 75a, 192a-193a). Eight pumping-generating units, with a total capacity of approximately 2,000 mw,[3] will be housed in the underground powerhouse (City App. 76a, 193a). At the river's edge, a 685-foot-long tailrace, with abutments at both ends and a horizontal cutback from the existing shoreline varying from 195 feet to 260 feet, will serve to withdraw water from and discharge water into the Hudson River. The tailrace will be located behind an existing railroad trestle upon which a fish protective device will be mounted (City App. 76a, 126a).

Rock excavated during construction of the powerhouse site will be used for the foundation of a 57-acre, mile-long, river-front park.[4] Located north and west of the project and adjacent to the present shoreline, the park area will include play areas, individual pic-

[3] One megawatt (mw) equals 1 million watts.

[4] The park will improve considerably the present decayed state of the area abutting the river, once the site of extensive commercial and industrial development (City App. 119a). The Commission rejected Con Ed's proposal for a visitor's information center and parking facilities at the powerhouse site (City App. 125a).

nic sites and shelters, and sanitary facilities (City App. 77a, 117a). A 36-acre scenic overlook, abutting a state highway, will also be constructed and will provide picnic sites and a picnic shelter (City App. 117a).

Energy generated from the project will be transmitted by submarine cables across the Hudson River and by underground cables, each approximately 1.6 miles long, to the Cornwall East underground terminal point located on the east side of the Hudson River at Nelsonville. An overhead transmission system, not visible from the river, will extend from that point approximately 9.2 miles to Con Ed's existing Pleasant Valley-Millwood-Sprain Brook transmission right-of-way in the vicinity of Kent on the west side of the Taconic State Parkway (City App. 76a, 193a–194a).[5]

B. PROCEDURAL BACKGROUND

The controversy over the Cornwall project first came before the court of appeals when the Scenic Hudson Preservation Conference—a petitioner herein—and the towns of Cortlandt, Putnam Valley and

---

[5] The Commission authorized an alternate underground powerhouse site, occupying 31.1 acres in the Palisades Inter-state Park, to be utilized if construction at the first site were precluded on judicial review (City App. 191a–192a). This location would provide shorter tunnels between the upper reservoir and powerhouse and a shorter river crossing for the transmission line. Construction at this site would eliminate the open tailrace and proximity to the Catskill Aqueduct. The scenic overlook, waterfront park, and upper reservoir would be the same (City App. 161a–171a). The court of appeals did not review this aspect of the Commission's order (City App. 11a, n. 6).

Yorktown sought to have three Commission orders set aside: (1) an order licensing Con Ed to construct the Cornwall pumped storage project, then designed to be partially above-ground (33 FPC 428); (2) an order denying applications for rehearing and for the reopening of proceedings to permit the introduction of additional evidence (33 FPC 964); and (3) an order denying joint motions to expand the scope of supplemental hearings to include consideration of the practicality and cost of underground transmission lines and of the feasibility of fish protective devices (33 FPC 965). The court of appeals concluded that the Commission should have received evidence on gas turbines, fish protective devices and underground transmission facilities and, accordingly, set aside all three orders and remanded the case to the Commission for further proceedings. *Scenic Hudson Preservation Conference* v. *Federal Power Commission* (*Scenic Hudson I*), 354 F.2d 608 (C.A. 2), certiorari denied *sub nom. Consolidated Edison Co.* v. *Scenic Hudson Preservation Conference*, 384 U.S. 941 (Scenic Hudson App. A62–A91).

Finding that the phrase "recreational purposes" in Section 10(a) of the Federal Power Act, 16 U.S.C. 803(a), encompasses "the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites" (Scenic Hudson App. A89), the court directed that on remand the proceedings must "include as a basic concern the preservation of natural beauty and of national historic shrines" (Scenic Hudson App. A90). In stressing the Commis-

sion's duty to develop a complete record, the court required the Comission to make a thorough study of possible alternatives to the project (Scenic Hudson App. A66) and to reexamine the whole fisheries question (Scenic Hudson App. A90). The court also found that the Commission had failed adequately to weigh the economic disadvantages of underground transmission lines against the aesthetic advantages (Scenic Hudson App. A87).

On remand, the Commission ordered (35 FPC 151) further proceedings before a Hearing Examiner to supplement the existing record. All parties were free to offer evidence on *all* matters bearing on whether a license for the project should be granted (*id.* at 152). Extensive proceedings were held on remand and, prior to issuing their decisions, both the Hearing Examiner and the Commissioners viewed the proposed project sites.

In August 1968, the Hearing Examiner issued his Initial Decision recommending that the license be granted (44 FPC 436). His decision contained extensive discussion of the proposed alternatives to the Cornwall project (44 FPC at 456–472), the impact of the project on scenic beauty and historical sites (44 FPC at 472–491), the fisheries question (44 FPC at 492–507), the routing and undergrounding of the transmission facilities (44 FPC at 507–513), the possible effect of the project on the Catskill Aqueduct serving New York City (44 FPC at 513–515), air pollution (44 FPC at 515–516) and the acquisition of the upper reservoir site (44 FPC at 516–517).

[illegible]

[illegible]

[illegible]

...of the possible reliable power during peak periods of demand. The Commission then examined in detail the following possible alternatives to a pumped storage project: (1) gas turbine generation; (2) all nuclear generation; (3) a nuclear-gas turbine generation combination; (4) the purchasing of power from other systems; (5) alternate conventional or pumped storage sites for hydroelectric generation; (6) generation of power from plants constructed next to coal mines; (7) conventional thermal units; and (8) fuel cells and other exotic methods of generation (City App. 98a–111a). Although only an all-gas-turbine facility and a gas turbine-nuclear combination "were seriously advanced as potentially feasible alternatives" (City App. 98a), each alternative was analyzed in terms of electric reliability, economics and environmental impact. On the basis of these criteria, the Commission found that the Cornwall project was superior to any possible alternative (City App. 188a).

The Commission next considered the environmental and aesthetic effects of the project works (City App. 111a–147a). It found the scenic impact minimal, since the powerhouse[*] and tunnel will not be visible and the size and location of the portal entrance and tailrace are such as not to detract from the view of Storm King Mountain. The upper reservoir will not be seen

---

[*] The powerhouse will be located beneath a riverside knoll in the Village of Cornwall and not underneath Storm King Mountain itself (City App. 116a).

All essential project works at the Hudson River site will be located below Storm King Highway which crosses the base of the mountain at elevations varying from 200 to 300 feet. The

from the Hudson River, and will blend with other artificial lakes in the area (City Apps. 161a–165a). The transmission lines in the vicinity of the river will be either underground or underwater. The above ground lines will not be visible from the river and will utilize existing rights-of-way as much as possible (City Apps. 125a–129a). The Commission found that further undergrounding would be less reliable and the aesthetic benefits to be derived would not justify the increased cost ultimately to be borne by the consumer (City Apps. 171a–183a).

Based upon the evidence of record, the Commission found that the percentage of the fish affected by project operations will be small and the fish population will be well protected by screening and replenished by hatchery operations (City Apps. 135a–147a). The

---

vertical rock cut for the tailrace and alternate sites from 1 to 10 feet above the water line to a maximum of 50 feet above the existing railroad embankments. Storm King Mountain is 1,340 feet high (City Apps. 162a). The examiner discussed in detail the aesthetic impact of the project upon the scenic beauty of the area (I FEIS 473–477).

"The wooded character of the licensed route will provide natural screening and the alignment of the valley in a northeasterly direction will facilitate location of the lines below the crests, thereby minimizing their visual impact" (City Apps. 162a).

"Article 36 of the license requires Con Ed to undertake studies during the first three years of operation to assess the project's impact on the fish population and to submit plans for this study no later than one year prior to completion of the project. Additionally, Article 36 provides for modification of the fish protective facilities as may be required" (City Apps. 139a–140a).

"The Commission took official notice of a study sponsored by the New York State Conservation Department and the United States Fish and Wildlife Service in which the New

Commission also found that the project will be compatible with existing and proposed recreational development of the Hudson River Gorge area, and that the proposed scenic overlook [12] and park will enhance the area (City App. 123a–125a). The Commission weighed the fact that the area has historical significance, and concluded that no historical site will be adversely affected by the project (City App. 128a–131a).

In considering the contention that the project would constitute a hazard to the Catskill Aqueduct (City App. 147a–157a), the Commission found, on the basis of expert testimony, that the geology of the area is such that the aqueduct will not be in jeopardy from either stress changes during excavations or vibrations resulting from blasting.[13]

Jersey Department of Conservation and Economic Development and the United States Bureaus of Sport Fisheries and Wildlife and of Commercial Fisheries participated, entitled *Hudson River Fisheries Investigations*, 1965–1968 (City App. 136a). The study concluded that there would be no significant adverse effects on the striped bass and American shad fisheries of the Hudson River from construction of the Cornwall project (City App. 26a).

[12] A 1957 report (Report on the Land and Water Resources of the New England-New York Region, Sen. Doc. No. 11, 85th Cong., 1st Sess.) recommended for the Hudson River Gorge "establishment of a system of highway waysides * * * to make available, in a safe manner, the scenic vistas of the countryside" (R. 23a, 56; City App. 21a).

[13] The court of appeals summarized the expert testimony on the possibility of damage to the aqueduct from blasting. Although witnesses for the City testified that blasting might present hazards, another witness disagreed sharply (City App. 32a–34a).

B. THE DECISION BELOW

Eight petitions for review of the Commission's decision were filed and consolidated in the court below. They alleged that the Commission had failed to comply with the Court's directives in *Scenic Hudson I*, that there was insufficient evidence to support the Commission's findings and that the Commission had not complied with the Federal Power Act, 16 U.S.C. 791a, *et seq.*, and the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

In upholding the Commission, the court below first held that the standard for judicial review with respect to all the Commission's findings of fact is the substantial evidence test; the court refused to adopt a different standard for the review of findings on environmental matters (City App. 7a–11a).

The court reviewed in detail the Commission's findings relating to (1) alternatives to the project (City App. 14a–20a), (2) the impact of the project on natural beauty and historical sites (City App. 21a–26a), (3) the fisheries question (City App. 26a–28a), (4) the undergrounding of transmission lines (City App. 28a–30a), and (5) the Cat-kill Aqueduct (City App. 31a–35a), and concluded that in each instance, the findings were amply supported by the record.

The court also held that the Commission had complied with its obligations under the Federal Power Act and NEPA to take into account environmental matters—such as the need to conserve natural resources and preserve scenic beauty and historical sites—and that there was "no real dispute" as to the

other findings required by Section 10(a) of the Federal Power Act, 16 U.S.C. 803(a) (City App. 36a). The court noted that NEPA envisions a "full consideration and balancing of various factors" by an agency in making a decision but "does not require that a particular decision be reached," and ruled that the Commission had fully complied with NEPA through the use of a "systematic, interdisciplinary approach" and through consultations with other federal and state agencies (City App. 37a–38a). The court concluded (City App. 38a):

> In view of the exhaustive environmental findings which occupy a substantial portion of the Commission's opinion, and the Commission's explicit conformance with the enumerated portions of the required statement, we conclude that full compliance with the National Environmental Policy Act has been demonstrated.

ARGUMENT

The contentions raised in the petitions were carefully reviewed and properly rejected by the court below. Since there is no conflict between the decision below and any decision of this Court or any other court of appeals, further review by this Court is not warranted.

1. Petitioners urge (Scenic Hudson Pet. 32–37; City Pet. 13–19; Sierra Club Pet. 6–7) that the court below should not have applied the substantial evidence test in reviewing the Commission's findings since, in their view, a broader standard of review should be applied to review findings on environmental matters.

The applicable statute, however, specifies the standard of judicial review and does not distinguish between the review of findings on environmental matters and the review of findings on other matters.

Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b), states in pertinent part that "the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Accordingly, in reviewing decisions of the Commission arising under the Federal Power Act, this Court has consistently emphasized the narrow and circumscribed role of a reviewing court and reaffirmed the applicability of the substantial evidence test. See, *e.g.*, *Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453; *Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S. 515; *Udall* v. *Federal Power Commission*, 387 U.S. 428. Cf. *Permian Basin Area Rate Cases*, 390 U.S. 747. As the court below pointed out (City App. 9a–10a), the cases relied upon by petitioners (*Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402; *Udall* v. *Federal Power Commission*, *supra*; *Zabel* v. *Tabb*, 430 F. 2d 199 (C.A. 5), certiorari denied, 401 U.S. 910) held only that the respective federal agencies involved must consider environmental factors in given situations; those cases did not establish a new standard of review of agency findings after an agency has properly considered such factors.

With respect to the City of New York's contention (City Pet. 13–19) that the court below should not have deferred to the Commission's findings with re-

spect to the Catskill Aqueduct because the Commission does not possess expertise in geological matters, two additional points should be made. First, in licensing a conventional or pumped storage hydroelectric project, the Commission routinely considers the geological formation upon which the project will rest;[14] the evaluation of geological evidence is thus within the competence of the agency. Second, the Commission had the benefit of extensive expert testimony relating to the possibility of damage to the Catskill Aqueduct. Section 313(b) of the Federal Power Act, *supra*, makes it clear that it is for the Commission to resolve any conflicts in such testimony. The Commission's opinion, as the court below found, reflects a careful consideration of the evidence on this matter and its conclusion that the risk to the aqueduct is "remote" (City App. 157a) is supported by substantial evidence.

2. Petitioners' argument (Scenic Hudson Pet. 19–28; City Pet. 24–25; Sierra Club Pet. 7) that the decision below conflicts with *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission*, 449 F. 2d 1109 (C.A.D.C.) is without merit. In *Calvert Cliffs*, the court of appeals held that NEPA requires an agency fully to explore all relevant environmental factors in reaching its decision. 449 F. 2d at 1112–1115. The court observed that the detailed statement required by NEPA provides "evidence that the mandated decision making process has in fact taken

[14] License applications must include data relating to the foundations underlying a proposed project. See 18 C.F.R. 4.41, Exhibit L.

place * * *." 449 F. 2d at 1114. The holdings of the court below that NEPA requires that "all factors have been fully explored" and that the Commission's opinion contained "exhaustive environmental findings" and the environmental impact statement required by Section 102(2)(C) of NEPA (City App. 37a-38a), are consistent with the decision in *Calvert Cliffs*.

Nor does the holding below directly conflict with the holding of a different panel of the same court in *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412 (C.A. 2). The court in *Greene County* held that the Commission staff must prepare a draft environmental impact statement with respect to a license application prior to the hearing on the license. In the present case, the extensive hearings and the two decisions of the Hearing Examiner preceded the effective date of NEPA. NEPA did become effective prior to the Commission's decision, however, and was taken into account in its ultimate determination as evidenced by the Commission's exhaustive discussion of environmental matters. In the special circumstances of this case, therefore, the question whether a draft environmental statement should have been prepared by the Commission staff prior to the hearing does not arise. Moreover, in *Greene County*, the court properly refused to halt

---

The Solicitor General has authorized the filing of a petition for a writ of certiorari in this aspect of the *Greene County* decision.

construction of two transmission lines where the application to construct them had been filed prior to the effective date of NEPA and authorization to construct them had been given subsequent thereto, because the Commission had required the applicant to give appropriate consideration to the protection of the environment and had independently investigated alternate routings. Although, unlike the situation here, the Commission never did issue an environmental impact statement with respect to the two lines, the court found that there had been "no obstinate refusal to comply with NEPA" and in allowing construction of the lines to go forward, the *Greene County* court cited the decision below, 455 F. 2d at 425. Because the Commission in the present case had not only exhaustively considered environmental matters, but also had issued an opinion containing an environmental impact statement, the court below properly refused to reverse the Commission's decision to license the Cornwall project.

3. Contrary to the argument of the City of New York (City Pet. 25–28), the court below properly held that Section 27 of the Federal Power Act (p. 4, *supra*), 16 U.S.C. 821, does not preclude the licensing of the Cornwall project. The statute by its terms is inapplicable since it protects rights in water, and nothing in the Commission's order authorizes Con Ed to appropriate or divert the City's water or authorizes interference with the aqueduct. If Con Ed does in fact interfere with the aqueduct,

Section 10(e) of the Act, 16 U.S.C. 803(e), makes Con Ed liable for damages."

The court of appeals' conclusion (City App. 31a-32a) that Section 27 is intended only to preserve a right of compensation if state-conferred water rights are taken or destroyed is correct and in accord with the Ninth Circuit's decision in *Portland General Electric Co.* v. *Federal Power Commission*, 328 F. 2d 165, 176. The City argues that in the *Portland* case the Ninth Circuit improperly relied on this Court's decisions in *City of Fresno* v. *California*, 372 U.S. 627, and *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, both interpreting another statute, Section 8 of the Reclamation Act, 43 U.S.C. 383. In *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 176-177; n. 20, however, this Court noted that the language of Section 27 is similar to that of Section 8 of the Reclamation Act and entitled to the same interpretation with respect to proprietary rights.

Nor is there any conflict with this Court's decision in *Henry Ford & Son, Inc.* v. *Little Falls Fibre Co.*, 280 U.S. 369. In that case, the Court affirmed a judgment granting money damages under Section 27 and permanent injunctive relief to a power plant licensee under state law whose operations had been adversely affected by the action of a licensee under the Federal Power Act. There, the recovery of money damages

---

The court found that there was substantial evidence to support the Commission's finding that the Catskill Aqueduct will not be affected by blasting or excavation at the project site (City App. 32a). See pp. 11, 17, *supra*.

alone would have been wholly inadequate against the continuing wrongful conduct of the federal licensee and the denial of injunctive relief would have led to a multiplicity of lawsuits. In the present case, however, the prospect of any injury occurring to the City of New York is remote.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

GORDON GOOCH,
General Counsel,

LEO E. FORQUER,
Solicitor,

J. RICHARD TIANO,
Deputy Solicitor,

LINDA E. BUCK,
Attorney,
Federal Power Commission.

MAY 1972.